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IN THE

Supreme Court of the United States

October Term, 1966
No. .....

SPINDLER REALTY CORPORATION, a corporation,
Petitioner and Appellant,

vs.

JOHN C. MONNING, as General Manager and Superintendent of Building and Safety of the City of Los Angeles,
Respondent and Appellee,

SPINDLER REALTY CORPORATION,
Plaintiff,

vs.

CITY OF LOS ANGELES,
Defendant and Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal, Second Appellate District, of the State of California.

Spindler Realty Corporation has petitioned this Honorable Court for a Writ of Certiorari directed to the District Court of Appeal, Second Appellate District, of the State of California to review the decision of that court in the above-entitled matter. It is submitted that for the reasons hereinafter set forth the petition should be denied.

I.

The Petition for Writ of Certiorari Herein Should Be Denied for Failure of Petitioner to Comply With Rules 21 and 23 of This Honorable Court.

Rule 21 of the Revised Rules of the Supreme Court of the United States in paragraph 1 thereof provides in part:

"Review on Writ of Certiorari shall be sought by filing with the clerk . . . forty printed copies of a petition, *which shall conform in all respects to Rule 23* . . ." (Emphasis added).

Rule 23 of such Revised Rules provides in the first paragraph of paragraph 1(f) thereof as follows:

"If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

It is submitted that the Petition for Writ of Certiorari herein is wholly devoid of *any* specification of where or how in the trial and appellate courts the federal questions sought to be reviewed herein were raised or how they were passed upon by those courts; that no quotation from the record is presented nor is reference thereto made so as to show that such federal questions were timely or properly raised; that such omissions im-

pose an onerous burden upon this Honorable Court and upon respondents herein in the consideration of this petition; and that for such reasons alone the petition herein should be denied.

II.

The Issues.

Both in its opening statement to the trial court [R.T. p. 3, line 15, to p. 5, line 13] and its opening brief to the District Court of Appeal (p. 12) petitioner herein urged three basic contentions in support of its position:

1. That the ordinance changing the zone from R5 to R1-H "was oppressive, discriminatory and bore no reasonable relation to the public welfare or safety and was unconstitutional on that ground."

2. That appellant had a vested right to receive a building permit for its apartment project and to build and maintain same notwithstanding the fact that the zone had been changed to permit only single family dwellings.

3. That appellant had an existing nonconforming use on the site for an apartment project and hence a right to be issued permits for and to erect and maintain same.

The District Court of Appeal in its opinion herein specifically recognized, discussed and rejected those three contentions (243 A.C.A. 260, 267, 268; Appendix "A" to Petition for Writ of Certiorari, p. 7).

The petition herein now sets forth *five* "Questions Presented" (pp. 2 and 3), which are basically simply an elaboration upon questions 1 and 2, above, and has

apparently abandoned its 3rd above set forth question (footnote number 1, p. 3 of petition herein).

Some comment must be made, however, upon the misleading language used in some of the five "Questions Presented" posed by petitioner at pages 2 and 3 of the present petition.

In Question No. 2 petitioner poses the question of whether "the City of Los Angeles can constitutionally prevent petitioner from building on" the subject property. The City of Los Angeles has never and does not now contend that petitioner cannot build on the subject property. It simply contends that petitioner like anyone else must build in conformity with the applicable zoning.

In Question No. 4 (a) petitioner asserts the *factual* premise that "the number of dwelling units per acre authorized by that zoning cannot physically be created, on the property." Suffice it to say that neither the trial court nor the District Court of Appeal ever passed upon such point, nor was such a contention ever even made in the lower courts. Raising such a point at this late stage in the proceedings, even assuming that it involved a federal constitutional question at all, does not suffice to open such question to review in the United States Supreme Court (*Radio Station WOW v. Johnson,* 326 U.S. 120, 65 S. Ct. 1475, 87 L. Ed. 2092; *Herndon v. State of Georgia,* 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530).

In Question No. 4 (b) petitioner asserts the *factual* premise that "the density requirements (i.e., the authorized number of dwelling units per acre) made applicable to petitioner's property are not applicable to any

other property, in the City, in that zone." Such is just plain not true. The authorized number of dwelling units per acre is based upon the applicable *zoning* of the property. The trial court specifically found in Finding of Fact 45 [C.T. p. 86, lines 16 to 19] that "The rezoning of the subject property from R5 to RI-H by Ordinance No. 121,338 was consistent with Ordinance No. 116,389, *establishing the R1-H zone and rezoning all of the property adjacent to and surrounding the subject property;* is consistent and compatible with the existing zoning, land use and development of all of such adjacent and surrounding property; . . ." (Emphasis added). It is thus apparent that the zoning density applicable to petitioner's property was the same as for all the adjacent and surrounding property.

To the extent that petitioner's claims of denial to it of certain federal constitutional rights were based upon its own erroneous assumptions of the facts involved, such claims are without merit and afford no basis for review by the United States Supreme Court (*Parker v. McLain,* 237 U.S. 469, 35 S. Ct. 632, 59 L. Ed. 1051).

It is submitted that the basic questions involved herein are simply (1) the validity of the rezoning of the subject property from R5 to R1-H, and (2) whether petitioner herein had a vested right to receive building permits for an apartment project on the subject property in conflict with the existing single family zoning thereof by reason of the fact that it had commenced grading such site for no specified purpose and in connection with no particular project prior to the enactment of such zoning.

III.

The "Statement" of the Case Set Forth in the Petition Is Misleading in Its Omissions and Misstatements and Thereby Constitutes Adequate Basis for Its Denial.

The pertinent facts of this case are neatly and succinctly set forth in the opinion of the California District Court of Appeal (Appendix "A" to the Petition for Writ of Certiorari herein) and the following comments are based thereon unless otherwise specifically set forth.

Petitioner first states (Pet. p. 4) that the "basic facts are not in dispute" and in support thereof in footnote 2 refers to Findings 1 to 41 of the trial court. It makes no mention of Findings 42 to 47 [C.T. p. 86, line 1, to p. 87, line 9] as being part of such "basic facts" when in truth they are the basic ultimate determinations of the trial court in answer to petitioner's contentions herein.

Petitioner next states (Pet. p. 4) that it had "spent the sum of $522,541.55 to grade and otherwise develop its real property for multiple housing (zone R-5) purposes." It *fails* to make clear, however, that this money was spent over a fourteen year period for a series of projects which it voluntarily abandoned or never fully formulated right up to the end of such expenditures.

Petitioner next states (Pet. p. 4) that it had "been induced to make these expenditures by reason of a long series of City permits and like authorizations, including a grading permit." Such permits and authorizations

consisted of the rezoning of the property as R5 in 1948 in proceedings wherein petitioner had expressed its intention to erect a small 150 room hotel on the site [R.T. p. 566, line 24, to p. 568, line 7]; of the grant of conditional use to petitioner in 1956 to conduct incidental business and recreational facilities in conjunction with a 150 room hotel [R.T. p. 2127, line 22, to p. 2128, line 7]; of annual extensions of time to commence use of such conditional use hotel privilege to December 4, 1961; and of the issuance of a grading permit for the site "without reference to any particular proposed use of the property as to the number, size or type of buildings to be erected on the site" (Opinion of District Court of Appeal, Appendix "A" to Pet. p. 3). It seems obvious that petitioner could not have been induced by such city actions relating to a hotel project or to no specified project at all to expend some or any money toward the erection of its now sought 1,040 unit high-rise apartment complex.

Petitioner next states (Pet. p. 4) that "An application for a building permit was filed, together with building plans, before the enactment of the rezoning statute. As proceedings to rezone were pending, a building permit was never granted." Such statement is untrue. Petitioner carefully *fails* to mention that the only plans filed by it *prior* to the enactment of the zone change "were inadequate for plan checking . . . and petitioner . . . requested the Department of Building and Safety not to check them, but to wait for new or additional plans to be filed" [Find. of Fact 23; C.T.

p. 79, lines 4-12]. Petitioner further fails to mention that the new plans filed March 27, 1962, some three weeks *after* the enactment of the rezoning ordinance, required a series of corrections which it was stipulated could have been made after June 1, 1962 and further that petitioner was specifically advised by the city that such project was prohibited by the existing zoning, *not* by "pending" zone change proceedings [Find. of Fact 24; C.T. p. 79, line 26, to p. 80, line 8].

Petitioner next states (Pet. p. 4) that "The Trial Court found that petitioner had a 'vested right' to complete the grading of the building site for an R5 purpose." The trial court in *fact* found [Find. of Fact 22; C.T. p. 78, lines 29 and 30] only that "petitioner had acquired a vested right to complete the grading under the grading permit issued to it" and no mention was made by the trial court of a vested right to grade "for an R5 purpose."

Petitioner next states (Pet. p. 6) that "The density (or number of dwelling units authorized) for property zoned in R1-H was 2½ units per acre (Appx. 'E'). The density authorized for petitioner's property was twice that, or 5 units per acre (*Ibid.*)." The first statement is true. The second is not. R1-H zoning which is applicable to petitioner's property and to "all of the property adjacent to and surrounding" same [Find. of Fact 45] requires lots of a minimum of 15,000 square feet which, after deducting streets necessary to a residential development, results in approximately 2½ lots (or dwelling units) per acre. Appendix

"E", however, to which petitioner refers in support of its allegation that it is "authorized" to have *twice* the R1-H density or 5 units per acre in fact gives no such authority. Appendix "E" as is clearly shown thereon is not a zoning map at all. It is the "General Plan" for all of the Santa Monica Mountains consisting of some 92 square miles. It is simply a *guide* to future zoning and shows only the possible *future* permitted density of the subject property at 5 units per acre. (It is to be noted that even a 5 unit per acre density is a far cry from the 1,040 units which petitioner seeks to place on its 21 acres, or roughly *50* units per acre).

Finally, petitioner states (Pet. p. 6) that "The statute was not a general zoning ordinance of broad application but was 'spot zoning' applicable to petitioner's property only." Although it is true that Ordinance No. 121,338 did rezone petitioner's 21 acres to R1-H, it is to be noted that such rezoning simply brought petitioner's property into line with and placed it in the same zone as "all of the property adjacent to and surrounding the subject property" [Find. of Fact 45] and hence, if anything, simply corrected and wiped out the "spot" zoning which originally had been granted to petitioner in 1948.

It is submitted that to the extent that petitioner has failed to accurately state the facts involved herein such constitutes "a sufficient reason for denying his (its) petition." (Rule 23, paragraph 4 of the Revised Rules of the Supreme Court of the United States).

IV.

No Special or Important Reason Exists for the Issuance of the Writ Requested Herein.

Although petitioner only specifically mentions the 5th and 14th amendments to the federal constitution in connection with its first question (Pet. p. 2), makes passing mention of *some* constitution in connection with its second question (Pet. p. 2) and makes *no* mention at all of a constitutional question in connection with its third, fourth and fifth questions (Pet. p. 3), we must assume that it is urging in support of each of its contentions that its property has been taken without due process of law in violation of the federal constitution. It is submitted that the law is now clear and firmly established that property has not been "taken" by the reasonable zoning thereof or by the denial of building permits for a use not in conformity with such zoning. (*Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303; *Zahn v. Board of Public Works*, 274 U.S. 325, 47 S. Ct. 594, 71 L. Ed. 1074; *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348).

This court has further clearly held that where the question as to the propriety of the zoning is "fairly debatable . . . the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." (*Zahn v. Board of Public Works, supra*, 274 U.S. 325, 328; *Euclid v. Ambler Realty Co., supra*, 272 U.S. 365, 388; *Sproles v. Binford*, 286 U.S. 374, 388, 52 S. Ct. 581, 76 L. Ed. 1167; *Radice v. New York*, 264 U.S. 292, 294, 44 S. Ct. 325, 68 L. Ed. 690). This principle has been

echoed and followed by state courts throughout the nation in hundreds of zoning decisions, including decisions of the California courts (*Lockard v. City of Los Angeles,* 33 Cal. 2d 453, 461, 202 P. 2d 38, petition for writ of certiorari to the Supreme Court of California denied—337 U.S. 939, 69 S. Ct. 1516, 93 L. Ed. 1744; *Miller v. Board of Public Works,* 195 Cal. 477, 490, 234 Pac. 381, appeal dismissed—273 U.S. 781, 47 S. Ct. 460, 71 L. Ed. 889; *Robinson v. City of Los Angeles,* 146 Cal. App. 2d 810, 815, 304 P. 2d 814; *Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal. 2d 515, 522, 523, 370 P. 2d 342, appeal dismissed—371 U.S. 36, 83 S. Ct. 145, 9 L. Ed. 2d 112).

With these principles in mind this court's attention is directed to the specific findings of the trial court herein that the rezoning of the subject property to R1-H was consistent with the earlier ordinance "establishing the R1-H zone and rezoning all of the property adjacent to and surrounding the subject property; is consistent and compatible with the existing zoning, land use and development of all of such adjacent and surrounding property; and is rationally connected with maintaining a limited density of development for the entire area . . ." [C.T. p. 86, lines 16-23]; that the rezoning of the subject property "bears a substantial relationship to the accomplishment of a proper public purpose under the police power, and is not arbitrary or unreasonable. Its adoption is a matter over which reasonable minds might differ." [C.T. p. 86, lines 29-32]; that the application of the R1-H zone to the "subject property does not deprive petitioner or plaintiff of the entire use or entire economic benefit of its property and is not discriminatory or confiscatory. On

the contrary, said ordinance is reasonable in object and not arbitrary in operation." [C.T. p. 87, lines 1-6.]

It is submitted that there was ample evidence in the record to support the above findings and that the above findings fully support the determination of the California courts upholding the validity of the zoning in question.

With respect to petitioner's contention that it had commenced grading its property prior to the enactment of the zone change ordinance and thereby had secured to itself a "vested right" to proceed with its apartment complex, suffice it to say that no case of this or any other court to which petitioner cites us so holds. As the California District Court of Appeal pointed out, the grading permit was issued "without reference to any particular proposed use of the property as to the number, size or type of buildings to be erected on the site." (Appendix "A" to petition, p. 3). Petitioner itself wasn't sure of just what it wanted to erect on the site as evidenced by the fact that the project encompassed by its plans submitted 3 weeks *after* the enactment of the rezoning ordinance substantially differed from the plans submitted 2 weeks previous thereto [R.T. p. 2336, line 1, to p. 2338, line 14]. Are we to understand petitioner's contention to be that by commencing grading it had somehow secured to itself a "vested right" to construct on the premises whatsoever it *subsequently* chose to erect, completely apart from the limitations of an intervening change of zone? We submit that the lower courts correctly decided that petitioner had no such right, but had only a vested right to complete its grading, if it so wished, for which

it had submitted specific plans and had obtained a permit and commenced preliminary operations. (Appendix "A" to Pet. p. 10). It is submitted that the law on this point is correctly set forth in *Anderson v. City Council,* 229 Cal. App. 2d 79, 40 Cal. Rptr. 41, wherein the court stated at pages 89 and 90:

> "Where a building permit to erect a specific type of building is issued by a county or city and the permitee acts upon it and incurs obligations, or in good faith commences construction, his rights become vested and the governmental body is thereafter estopped to set up a zoning ordinance subsequently enacted. (citation) Where no such permit has been issued, it is difficult to conceive of any basis for such estoppel. . . . These authorities (citations) establish the rule that respondents did not acquire a vested right, as against future zoning, merely by purchasing the property in reliance on the existing zoning and thereafter making certain endeavors to develop it for a specified use."

To the same effect, see also *Brougher v. Board of Public Works,* 205 Cal. 426, 434, 271 Pac. 487; *Price v. Schwafel,* 92 Cal. App. 2d 77, 82-85, 206 P. 2d 683.

Moreover, the mere fact that petitioner has expended money in reliance upon the previously existing zoning or has suffered a reduction in value of the property as a result of such rezoning, although regrettable, does not suffice to invalidate such rezoning. Thus in *Hadacheck v. Sebastian, supra,* the rezoning of the subject property so as to preclude an operating brick yard, was upheld notwithstanding the fact that ex-

tensive excavations in connection with brickmaking had occurred thereon and that the property would be reduced in value from approximately $800,000 to $60,000. Similarly, in *Consolidated Rock Products Co. v. City of Los Angeles, supra,* the California Supreme Court at pages 531 and 532 of 57 Cal. 2d quoted with approval from *West Bros. Brick Co. v. City of Alexandria,* 169 Va. 271, 192 S.E. 881 (appeal dismissed—302 U.S. 658, 85 S.Ct. 369, 82 L.Ed. 508) wherein a rezoning ordinance was upheld, stating in referring to zoning ordinances:

> "General rules applicable thereto are now well settled. They must not be wholly unreasonable, but they are presumed to be valid and to have been promulgated by those familiar with local conditions. Vested interests will not defeat them, and of course constitutional rights are not to be measured in terms of money. That, however, is a consideration to be remembered. Great financial losses should not be inflicted where benefits to others are negligible, but public welfare and public convenience do control and are in themselves terms constantly adjusted to meet new conditions. Upon those who would set aside such ordinances rests a heavy burden of proof. They stand when their validity is debatable."

Similarly in *Marblehead Land Co. v. City of Los Angeles,* 47 F. 2d 528, certiorari denied—284 U.S. 634, 52 S. Ct. 18, 76 L. Ed. 540, the rezoning of the subject property so as to preclude oil drilling was upheld notwithstanding the fact that plaintiff Standard Oil Co. had leased the property and paid $65,000 therefor and had additional expended $136,000 toward oil drilling operations in reliance on the existing zoning.

Conclusion.

It is submitted that for the reasons above set forth the petition for writ of certiorari herein should be denied.

Respectfully submitted,

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